

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BRAD ERHART,

Plaintiff,

v.

TRINET HR XI INC; SWITCHBOARD
TECHNOLOGY LABS INC; HARTFORD
LIFE AND ACCIDENT INSURANCE
COMPANY INC.,

Defendants.

Case No. 3:23-cv-05882-TMC

ORDER DENYING DEFENDANT’S
MOTION TO COMPEL ARBITRATION

Before the Court is Defendant Switchboard Technology Labs Inc.’s motion to compel arbitration. Dkt. 17. Because Switchboard has not shown the existence of a valid agreement to arbitrate, the Court DENIES Switchboard’s motion.

I. PROCEDURAL HISTORY

Pro se Plaintiff Brad Erhart filed this case on September 29, 2023, against Defendants Switchboard, TriNet HR Xi Inc. (“TriNet”), and Hartford Life and Accident Insurance Company Inc. (“Hartford”). Dkt. 1. Mr. Erhart alleges, among other things, disability discrimination, wrongful termination, and breach of contract arising from his previous employment with

1 Switchboard/TriNet and disability benefits he received from Hartford. *Id.* On December 1, 2023,
2 Switchboard moved to compel arbitration of the claims against it based on an arbitration
3 provision contained within the “TriNet Terms and Conditions Agreement” (“TCA”), a document
4 Switchboard contends was incorporated by reference into Mr. Erhart’s signed employment
5 contract. Dkt. 17. Mr. Erhart responded by asserting that the TCA was not incorporated into his
6 contract and any enforcement of arbitration would be unconscionable. Dkt. 21. Switchboard
7 replied (Dkt. 25) and the Court heard oral argument (Dkt. 34). Neither TriNet nor Hartford
8 joined in Switchboard’s motion.

9 II. BACKGROUND

10 On August 13, 2021, Chris Hermida, the co-founder and CEO of Switchboard, emailed
11 Mr. Erhart an offer of employment as a Senior DevOps Engineer. Dkt. 22 at 7. Hermida’s email
12 contained four attachments: an offer letter, a summary of Switchboard’s health care plan, an
13 employee benefits guidebook, and a nondisclosure and invention assignment agreement
14 (“NDIAA”). *Id.* It did not contain a copy of the TCA. *See id.*

15 The next day, after Mr. Erhart received the offer, he reached out to his recruiter with
16 questions—leading with his concern that it was unclear whether Switchboard or TriNet was to be
17 his “employer of record” and that he needed more information about “any contractual
18 arrangements between” the two entities. *Id.* at 9.

19 After Mr. Erhart’s inquiries, Hermida emailed and spoke with Mr. Erhart to “walk
20 through each of [his] concerns.” *Id.* at 11. According to Mr. Erhart, during the call he asked
21 about Switchboard’s professional employer organization (“PEO”) relationship with TriNet and
22 asked for a copy of the PEO contract between the two companies. Dkt. 1 at 4. Following the call,
23 on August 19, Hermida emailed Mr. Erhart stating Switchboard was “unable to provide a copy of
24 [its] contract with TriNet.” Dkt. 18 at 9. Instead, Hermida attached an “employee handbook” and

1 a document he described only as “TriNet’s terms.” *Id.* Nothing in Hermida’s email explained the
2 relevance of “TriNet’s terms” to Mr. Erhart’s potential employment with Switchboard. Hermida
3 stated that Switchboard would send a revised offer letter. *Id.*

4 Hermida emailed Mr. Erhart the new offer letter on August 23. Dkt. 22 at 18; Dkt. 18 at
5 5–7. Three sections of the offer letter are relevant to this motion.

6 First, in a section titled “Acknowledgment of Company Handbook and Confidentiality
7 Agreement,” the offer letter stated:

8 As a **Switchboard Technology Labs, Inc.** employee, you are required to follow
9 its rules and regulations. Therefore you will be asked to acknowledge in writing
10 that you have read the **Switchboard Technology Labs, Inc.** employee handbook(s)
11 **and sign and comply with the attached Employee Non-Disclosure and
Invention Assignment Agreement (the “Proprietary Information
Agreement”), which prohibits, among other things, the unauthorized use or
disclosure of Switchboard Technology Labs, Inc.’s confidential and
proprietary information.**

12 Dkt. 18 at 6 (emphasis in original). This section drew clear attention to the importance of the
13 Proprietary Information Agreement and its role in employment with Switchboard. A copy of that
14 agreement was attached to Hermida’s email containing the revised offer letter (as it had been to
15 the initial offer letter). *See* Dkt. 22 at 7, 18.

16 Second, in a section titled “Benefits,” the offer letter stated:

17 **Switchboard Technology Labs, Inc.**, through TriNet, offers a full range of benefits
18 for you and your qualified dependents as outlined in the attached Summary of
19 Benefits. A presentation of our benefits program will be given to you during your
20 first week of employment. Information about these benefits is included with this
21 letter, and additional information will be available on-line on the terms and
conditions included in the Terms and Conditions Agreement (TCA) each new
employee must accept in order to access TriNet’s on-line self-service portal, TriNet
Passport.

22 Dkt. 18 at 6 (emphasis in original). In contrast to the Proprietary Information Agreement (and the
23 benefits summary), the TCA was not attached to either the original or revised offer letter. *See*
24 Dkt. 22 at 7, 18. Instead, as quoted above, the offer letter informed Mr. Erhart he would be

1 presented with the TCA at some later unspecified time, “on-line,” when he would have to accept
2 the TCA to use “TriNet’s on-line self-service portal.” Dkt. 18 at 6.

3 Third, the letter concluded in relevant part:

4 This offer letter, together with the TCA **and your Employee Non-Disclosure and**
5 **Invention Assignment Agreement**, forms the complete and exclusive agreement
6 as to your employment with **Switchboard Technology Labs, Inc.** . . . If you wish
7 to accept employment at **Switchboard Technology Labs, Inc.** under the terms
described above, **please sign and date this letter and the Employee Non-**
Disclosure and Invention Assignment Agreement and return them to your
supervisor at Switchboard Technology Labs, Inc. by 08/25/2021.

8 *Id.* at 6–7 (emphasis in original). This conclusion, while purporting to incorporate the TCA into
9 the “complete and exclusive agreement” as to employment, uses bold text and the requirement of
10 separate signatures to focus the employee’s attention on the offer letter and the Proprietary
11 Information Agreement, and away from the TCA. Nothing in the letter informs the employee that
12 the TCA—which was not attached to either offer letter, and which the letter represented would
13 be given to the employee online, later, as part of additional information about “benefits”—
14 contains a mandatory arbitration clause. And with respect to Mr. Erhart specifically, Hermida
15 never informed him that the TCA was the same document he called the “TriNet terms” and had
16 attached to a previous email a few days earlier in response to Mr. Erhart’s queries about
17 agreements between Switchboard and TriNet.

18 Mr. Erhart signed the offer letter and NDIAA on August 23, 2021. *See* Dkt. 21 at 7;
19 Dkt. 22 at 20. On August 31, when Mr. Erhart began work, Dkt. 21 at 7, he received an email
20 from TriNet to set up his benefits portal as part of his on-boarding process. *See* Dkt. 22 at 22.
21 The email instructed him that as part of setting up his “profile in TriNet’s system,” he should
22 “Read the TriNet Terms and Conditions Agreement (TCA), and if you agree to the TCA, then
23 click Accept.” *See id.*

24 The “TriNet Terms and Conditions Agreement (TCA)” states on its first page that it

1 “contains important information regarding . . . use of the TriNet Platform and online services,
 2 and the handling of any disputes arising out of your relationship with TriNet, your company, and
 3 related matters.” Dkt. 18 at 11. The terms include a section titled “Dispute Resolution Protocol
 4 (“DRP”) and Mandatory Arbitration of Claims.” *Id.* at 15. The section states, “arbitration will be
 5 used instead of going before a court . . . for any dispute arising out of or relating to your co-
 6 employment with TriNet and/or arising out of or relating to your employment with your
 7 company, and for any dispute with an employee, officer, or director of TriNet or of a TriNet
 8 customer.” *Id.*

9 Mr. Erhart does not recall accepting the TCA, nor has Switchboard or TriNet presented
 10 documentation of acceptance. Dkt. 21 at 8. Instead, Switchboard argues that the TCA was
 11 incorporated by reference into Mr. Erhart’s offer letter, and that he became bound by the TCA’s
 12 mandatory arbitration provision when he accepted the offer of employment. Dkt. 17 at 5–6.

13 III. LEGAL STANDARD

14 A. Federal Arbitration Act

15 The Federal Arbitration Act (“FAA”) makes agreements to arbitrate “valid, irrevocable,
 16 and enforceable, save upon such grounds as exist at law or in equity for the revocation of any
 17 contract.” 9 U.S.C. § 2. “A party seeking to compel arbitration has the burden under the FAA to
 18 show (1) the existence of a valid, written agreement to arbitrate; and, if it exists, (2) that the
 19 agreement to arbitrate encompasses the dispute at issue.” *Ashbey v. Archstone Prop. Mgmt., Inc.*,
 20 785 F.3d 1320, 1323 (9th Cir. 2015). While there is an “emphatic federal policy in favor of
 21 arbitral dispute resolution,” *KPMG v. Cocchi*, 565 U.S. 18, 21 (2011), the Court must make the
 22 threshold determination that a valid contract was formed before ordering arbitration, *see Simula,*
 23 *Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999); *Lowden v. T-Mobile USA, Inc.*, 512 F.3d
 24 1213, 1217 (9th Cir. 2008). Courts apply state contract law to determine whether the parties

1 formed a valid agreement to arbitrate. *Lowden*, 512 F.3d at 1217 (citing *First Options of Chi.,*
 2 *Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). Switchboard agrees that Washington contract law
 3 governs that question here. Dkt. 17 at 5.

4 **B. Washington law on contract formation**

5 In Washington, “[a]rbitration agreements stand on equal footing with other contracts.”
 6 *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 47, 470 P.3d 486 (2020). And “mutual assent is
 7 required for the formation of a valid contract. It is essential to the formation of a contract that the
 8 parties manifest to each other their mutual assent to the same bargain at the same time.” *Id.* at 48
 9 (cleaned up).

10 “This rule applies to the formation of an arbitration agreement just as it does to the
 11 formation of any other contract.” *Id.* “The first principle that underscores all of our arbitration
 12 decisions is that arbitration is strictly a matter of consent,” *id.* (quoting *Lamps Plus, Inc. v.*
 13 *Varela*, 587 U.S. 176, 184 (2019)), and “a party cannot be required to submit to arbitration any
 14 dispute which he has not agreed so to submit.” *Id.* at 48 (quoting *Satomi Owners Ass’n v.*
 15 *Satoma, LLC*, 167 Wn.2d 781, 810, 225 P.3d 213 (2009)).

16 Under Washington contract law, “incorporation by reference does not, in itself, establish
 17 mutual assent to the terms being incorporated.” *Id.* at 49. Instead, “it must be clear that the
 18 parties to the agreement had knowledge of and assented to the incorporated terms.” *Id.* (cleaned
 19 up). “Mutual assent is gleaned from outward manifestations and circumstances surrounding the
 20 transaction.” *Id.* at 50.

21 **IV. DISCUSSION**

22 **A. Switchboard has not shown an agreement to arbitrate.**

23 The Washington Supreme Court decided *Burnett v. Pagliacci Pizza* in August 2020—a
 24 year before the events giving rise to this case. *Burnett* is the most recent precedent from

1 Washington’s highest court on the doctrines of mutual assent and incorporation by reference
2 under Washington contract law. Yet when Switchboard filed its motion to compel arbitration in
3 December 2023, relying on the doctrine of incorporation by reference, it failed in either its
4 motion or reply brief to even acknowledge the existence of *Burnett*, let alone address its
5 application to this case. Instead, Switchboard—litigating against a pro se plaintiff—relied
6 entirely on cases decided before *Burnett*. See Dkt. 17 at 5–6. This Court scheduled oral argument
7 and directed the parties to address *Burnett*. Dkt. 31. At oral argument, in response to the Court’s
8 concerns that Switchboard’s motion showed a lack of candor to the tribunal, Switchboard
9 maintained that *Burnett* has no application whatsoever to this case.

10 These arguments are unpersuasive; to the contrary, *Burnett* controls the outcome of
11 Switchboard’s attempt to compel arbitration. In *Burnett*, the plaintiff, a pizza delivery driver,
12 attended a mandatory new employee orientation at the outset of his employment. 196 Wn.2d at
13 42–43. To begin working, Burnett was required to sign an “Employee Relationship Agreement,”
14 referred to in the opinion as “the ERA.” *Id.* at 43. The ERA did not mention arbitration. *Id.*
15 Instead, in a section entitled “Rules and Policies,” the ERA referred to a separate document
16 called the “Little Book of Answers.” *Id.* Although Pagliacci gave Burnett a copy of the Little
17 Book of Answers at the orientation, he was “told to read it at home,” and the ERA similarly
18 instructed: “On your own initiative you will learn and comply with the rules and policies
19 outlined in our Little Book of Answers.” *Id.* The Little Book of Answers contained a mandatory
20 arbitration policy, which Pagliacci argued had been incorporated by reference into Burnett’s
21 signed Employee Relationship Agreement. See *id.* at 44–46. The trial court disagreed, ruling that
22 the arbitration provision was not incorporated by reference. *Id.* at 45. The Washington Court of
23 Appeals overturned that ruling (agreeing instead with Pagliacci that there was an agreement to
24 arbitrate) but invalidated the agreement on the grounds of unconscionability. *Id.* at 46.

1 After granting Pagliacci's petition for review, the Washington Supreme Court ruled for
2 Burnett on both grounds, affirming the Court of Appeals that the arbitration agreement was
3 unconscionable but also holding, "as a threshold matter," that Burnett never assented to the
4 mandatory arbitration provision because he had no notice of it when he signed his employment
5 contract. *Id.* at 47. The Washington Supreme Court explained that even if "the mention of the
6 handbook in the ERA effectively incorporates the handbook by reference into the ERA, that does
7 not mean there was an effective arbitration *agreement* between Burnett and Pagliacci." *Id.* at 49.
8 "While the arbitration provision existed in the handbook when Burnett signed the ERA, Burnett
9 still had no knowledge of it as he was expected to read the handbook later, on his own time." *Id.*
10 Because Burnett did not have "a reasonable opportunity to understand the terms contained in the
11 Little Book—and specifically the mandatory arbitration policy—before he signed the ERA," he
12 "lacked knowledge of the incorporated terms," and therefore "never assented" to the mandatory
13 arbitration policy. *Id.* at 50.

14 There is no meaningful distinction between *Burnett* and this case. Switchboard contends
15 in its motion to compel arbitration that its offer letter to Mr. Erhart "clearly and unequivocally"
16 "incorporates the TCA in full, including its arbitration provision." Dkt. 17 at 5–6. But as *Burnett*
17 holds, that is not enough to show an "effective arbitration agreement," because "it must be clear
18 that the parties to the agreement had knowledge of and assented to the incorporated terms." 196
19 Wn.2d at 49 (cleaned up). Here, just as in *Burnett*, nothing in the offer letter mentioned
20 arbitration or gave any indication to Mr. Erhart that the TCA contained a mandatory arbitration
21 provision. *See* Dkt. 18 at 5–7. Instead, the offer letter told Mr. Erhart that he would read the TCA
22 later, after signing the contract, as part of "additional information" about "benefits." Dkt. 18 at 6.

23 At oral argument, counsel for Switchboard argued that *Burnett* is distinguishable because
24 here, Mr. Erhart happened to receive a copy of the TCA a few days before the offer letter (when

1 he had asked Hermida for a different contract outlining Switchboard’s PEO relationship with
2 TriNet); therefore, Switchboard maintains, he had a reasonable opportunity to understand its
3 terms before signing. Switchboard’s argument is essentially that because Mr. Erhart is a software
4 engineer rather than a pizza delivery driver, he should have been able to piece together that the
5 document Hermida emailed to him days earlier as “TriNet’s Terms”—in response to Mr. Erhart’s
6 separate inquiry about agreements between Switchboard and TriNet—was in fact the TCA
7 referenced in the offer letter, and he should have known to read it before signing, despite
8 Switchboard telling him the TCA was something he would receive later in connection with the
9 online benefits portal.

10 This is a distinction without a difference. If anything, Switchboard’s actions demonstrate
11 more affirmative misdirection than those of Pagliacci Pizza. In *Burnett*, the employer gave the
12 “Little Book of Answers” to Burnett at the same orientation where it required him to sign the
13 employment agreement. 196 Wn.2d at 43. But because he was told to read it later after signing,
14 and nothing in the employment agreement itself alerted him to the presence of the arbitration
15 policy, the Court concluded that Pagliacci could not show Burnett had knowledge of and
16 assented to its terms. *See id.* at 47–50. Here, Switchboard did not even provide the offer letter
17 and the TCA to Mr. Erhart at the same time. The offer letter mentioned the TCA in a section on
18 “benefits,” not the section discussing “rules and regulations”; it told Mr. Erhart he would receive
19 the TCA later when accessing the benefits portal; and it used bold typeface to emphasize other
20 aspects of the employment agreement and draw attention away from the TCA. *See* Dkt. 18 at 5–
21 7. It is not reasonable to expect Mr. Erhart to have understood from that letter that it was
22 incorporating a document sent days earlier, with a different name, in response to an unrelated
23 question, with no description of its relevance to his employment with Switchboard. Like
24 Mr. Burnett, Mr. Erhart did not have “a reasonable opportunity to understand the terms


1 contained” in the TCA—“and specifically the mandatory arbitration policy”—before he signed
2 the offer letter. *Burnett*, 196 Wn.2d at 50. He therefore “lacked knowledge of the incorporated
3 terms” and “never assented” to the mandatory arbitration provision. *Id.* Without “mutual assent
4 to the same bargain at the same time,” Switchboard and Mr. Erhart did not form a valid
5 agreement to arbitrate under Washington law. *Id.* at 48.

6 V. CONCLUSION

7 Because the Court concludes that a valid agreement to arbitrate does not exist, it need not
8 address the parties’ other arguments such as unconscionability or whether “the agreement
9 encompasses the dispute at issue.” *Lowden*, 512 F.3d at 1217. Switchboard’s motion to compel
10 arbitration is DENIED.

11 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
12 to any party appearing pro se at said party’s last known address.

13 Dated this 25th day of March, 2024.

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16 Tiffany M. Cartwright
17 United States District Judge
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